No. 22,630

IN THE

United States Court of Appeals

For the Ninth Circuit

JONES STEVEDORING COMPANY, a corporation,
Appellant,

vs.

NIPPO KISEN COMPANY, LTD., a corporation,
Appellee.

NIPPO KISEN COMPANY, LTD., a corporation,
Appellant,

vs.

STOCKTON BULK TERMINAL COMPANY OF CALIFORNIA, INC., a corporation,
Appellee.

Appeal from the United States District Court for the Northern District of California

BRIEF FOR APPELLEE STOCKTON BULK TERMINAL COMPANY OF CALIFORNIA, INC.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Codes

Statutes

Texts

Rules

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I. STATEMENT OF THE CASE

The Findings of Fact and Conclusions of Law between Libelant and Respondent are undisturbed by this appeal and will state the general background of the case. They are as follows:

Findings of Fact

1. Libelant was at all material times employed as a longshoreman by Respondent-Impleaded, Jones Stevedoring Co. and/or Stockton Bulk Terminal Co. of California, Inc.

2. Respondent was at all material times the owner and operator of the MV Hokyo Maru which was engaged in the bulk iron ore trade.

3. On and prior to January 9th, 1962 the MV Hokyo Maru lay at berth port-side to at the port of Stockton, California, for the purpose of receiving a cargo of iron ore in bulk.

4. The usual and customary method of loading such a cargo at Stockton at the time in question, which was followed, in this case, consisted of the use of a shoreside conveyor apparatus which included a large heavy spout. A portion of the conveyor apparatus suspended the spout over the vessel's hold and the spout was used to direct the iron ore to various positions in the hold from time to time. The spout was hinged at the point of attachment to the conveyor to permit the bottom to be pulled in any direction.

5. The movement of the conveyor itself was limited and therefore the ship's cargo falls were used to move or position the bottom of the spout from time to time to the desired position in the ship's hold away from the vertical. This was accomplished by leading the ship's cargo falls fair from the top of the ship's cargo booms down to either side of the hatch coaming at or near which point the fall passed through a snatch block and were attached to a short wire pendant, which in turn was attached near the bottom of the spout. By positioning the snatch blocks at various points

forward and aft on the port or starboard side of the hatch coaming and by using the ship's winches as a source of power, the bottom of the spout could be moved away from the vertical as desired. The spout also had telescoping ability which is not material.

6. A snatch block differs from an ordinary ship's block only in that it can be opened from the side to insert a wire without the necessity of working with or to the end of the wire. In all other respects it is essentially the same as an ordinary ship's block. The throat of a block is that point near the top where wire or rope enters and leaves the block.

7. On or about January 9, 1962, Libelant was aboard the Hokyo Maru shortly before noon in the capacity of gang boss with his gang which was working at No. 2 hatch. No other shoreside workers possessing higher authority than Libelant as gang boss were present at No. 2 hatch at this time but at least two of Libelant's subordinates were present. The Hokyo Maru's Third Officer was also present observing the progress of cargo operations. Shortly before noon, the Third Officer asked that the iron ore cargo be distributed in another location in the ship's hold. The decision on how this should be accomplished rested entirely with Libelant.

8. Libelant, as gang boss, determined it would be necessary to move a snatch block on the starboard or offshore hatch coaming in order to place the spout in a new position. At this time, the starboard cargo fall ran fair from the top of the boom through the snatch block to a short pendant at the base of the spout and it held the bottom of

the spout in an offshore direction away from the vertical. Because of the substantial weight of the spout, the starboard fall was taut.

9. Libelant approached the snatch block with the intention of moving it by himself although additional shoreside help, his subordinates was available at the hatch and, subject to his orders, if he had elected to use it. Libelant, wearing gloves, approached the snatch block and grasped that portion of the starboard cargo fall which ran from the top of the starboard boom down to the snatch block. His right hand was a few feet away from the snatch block. He signalled the winch driver, his subordinate, for slack which was given. The substantial weight of the spout naturally caused it to seek its vertical position, which caused an abrupt movement of the cargo fall as it was slacked.

10. As the starboard cargo fall was being pulled slack by the substantial weight of the spout in seeking its vertical position but before the fall itself had gone slack, Libelant's right hand was suddenly drawn into the throat of the snatch block between the cargo fall and the sheave resulting in traumatic amputation of the outer portion of Libelant's second, third and fourth fingers and tissue and other injury to his first and fifth fingers.

11. All the Hokyo Maru's gear being in use at the time, as well as all appurtenances to the vessel embraced by the seaworthiness warranty conformed with the custom and usage of vessels in the same and similar trade.

12. Placing one's hands or either of them on a wire which is moving or about to be moved, such

as the cargo fall in this case, in the proximity of a snatch block or other fairlead device, involves the foreseeable risk that the person so doing may have his hand caught between the sheave and the wire or fall at the throat of the block.

13. The cargo fall at No. 2 starboard hatch in use at the time in question was in all respects fit and proper, free of defects and customary for the trade.

14. While there was ore dust present on the deck near No. 2 hatch, which is customary in such a loading operation, Libelant has failed to prove such area was rendered dangerous or slippery because of the dust or any combination of the dust and moisture.

15. Libelant has failed to prove that the Hokyo Maru was at any time or in any respect not reasonably fit for the service in which she was engaged and she was in all respects and at all material times fit for such service and seaworthy. Libelant has failed to prove and it is not true that Respondent or any Agent or employee of Respondent acted at any time otherwise than as a reasonable man of ordinary prudence in the circumstances. Libelant has failed to prove and it is not true that Respondent had or should have had notice of any improper condition aboard the Hokyo Maru and has failed to prove and it is not true that such condition existed.

16. Libelant has failed to prove the causal connection between any injuries sustained by him for which he complains and any negligence of Respondent or breach of Respondent's warranty of seaworthiness as vessel owner.

17. The sole proximate cause of any injuries Libelant sustained while on board the Hokyo Maru was the result of his own negligent conduct in placing his hand on a cable or cargo fall that was moving or about to move in the proximity of a snatch block or other obstruction.

Conclusions of Law

1. The Respondent shipowner does not have the burden of an insurer and is not required to provide an accident-proof ship, and the mere occurrence of an accident aboard ship does not impose liability upon the shipowner.

2. Libelant has the burden of proving by a preponderance of the evidence that his claimed injury was proximately caused by the negligence of Respondent or its breach of a warranty of seaworthiness.

3. Respondent was not negligent, did not breach any warranty of seaworthiness and was not otherwise at fault in the premises and any negligence which occurred was that of Libelant himself which was the sole proximate cause of his injury.

4. The parties are entitled to a Decree in favor of Respondent and against Libelant on the Libel reserving adjudication of Respondents' Impleading Petition to a later date."

In summary, these Findings and Conclusions establish that the vessel and the equipment used in loading same were not defective or unseaworthy in any way and that the sole proximate cause of the accident was the negligence of the Libelant himself.

The only fault which could be considered as a basis for a breach of a duty to perform a workmanlike service is the conduct of Libelant himself. No other is alleged, proved or found. On the question of indemnity, the following Findings and Conclusions were made by the trial court:

Findings of Fact

1. Plaintiff, Joseph F. Mastro, was at all material times employed as a longshoreman by Jones Stevedoring Co., and not by Stockton Bulk Terminal Company of California, Inc.

2. Third-party Plaintiff has reasonably expended the sum of $7,132.90 for legal services and expenses in defending the claim of Plaintiff, Joseph F. Mastro.

Conclusions of Law

1. Mastro's failure to exercise reasonable care and caution in the course and scope of his employment by Jones Stevedoring Co., constitutes a breach of Jones Stevedoring Co's., warranty to perform their work in a safe, proper and workmanlike manner.

2. Stockton Bulk Terminal Company of California, Inc., is entitled to a decree in its favor against Third-party Plaintiff.

3. Third-party Plaintiff is entitled to a decree in its favor against Third-party Defendant, Jones Stevedoring Co., in the amount of $7,-132.90, with court costs and interest from March 4, 1966.

The conclusion challenged is that which holds that Joseph F. Mastro was acting in the course and scope of his employment for Jones Stevedoring Co. as distinguished from Stockton Bulk Terminal Company and that his negligence constituted a breach of the warranty to perform workmanlike service. The only facts subject to review involve the relation of Jones Stevedoring Co. and Stockton Bulk Terminal Co. in reference to the employment of Mastro. We shall review them in more detail than heretofore reviewed in the briefs already on file.

Jones Stevedoring Co. (hereinafter referred to as "Jones") was a general stevedoring contractor in the Stockton area handling general and bulk trade cargo (R.T. May 8, 1967, p. 54). It was a member of the Pacific Maritime Association (P.M.A.), which is the employers' bargaining agent with the International Longshore and Warehousemen's Union (R.T. May 8, 1967, p. 47). It was subject to the terms of the Collective Bargaining Agreement between P.M.A. and the I.L.W.U. and could employ longshoremen through the I.L.W.U. hiring hall in Stockton. Only members of the P.M.A. could get men from the Union Hall in Stockton (R.T. May 8, 1967, pp. 50, 51).

Stockton Bulk Terminal Co. was a terminal company at the Port of Stockton. They leased the ore dock facilities, including means of unloading railroad cars of bulk ore, means of stockpiling ore and equipment used to load ore to a ship docked at the ore dock facilities (Deposition of A. W. Gatov, p. 6). They maintained and controlled these facilities and sup-

plied them for loading ships as made necessary under their arrangements with the Port of Stockton (R.T. May 8, 1967, p. 68; Deposition of A. W. Gatov, p. 16). The only employees of Stockton Bulk Terminal Co. were administrative and managerial in nature. They consisted of corporate officers, a general manager, an assistant manager and three clerical helpers. They did not hire others (Deposition of A. W. Gatov, pp. 6, 7, 8). Stockton Bulk Terminal Co. was not a member of P.M.A., was not subject to the terms of the Collective Bargaining Agreement between P.M.A. and the I.L.W.U., and could not "employ" longshoremen, gang bosses or walking bosses from the Union Hall (R.T. May 8, 1967, pp. 49, 50, 76).

Prior to and at the time of the case in question, there existed an oral contract or arrangement to provide longshoremen to operate the loading equipment owned by Stockton Bulk Terminal Co. (Deposition of A. W. Gatov, p. 10; R.T. May 8, 1967, p. 46). The terms of this agreement are not in dispute; only the nomenclature describing the agreement is disputed. Rudolf J. Danska (Vice President of Jones) testified it was a "payroll service" (R.T. May 8, 1967, p. 48). A. W. Gatov, President of Stockton Bulk Terminal Co., testified that Jones was a "labor contractor" (Deposition of A. W. Gatov, p. 7).

The method of operation was as follows: longshoremen, gang bosses, and walking bosses were supplied by the I.L.W.U. hiring halls to work, pursuant to Jones' membership in P.M.A. and their contract with the I.L.W.U. (R.T. May 8, 1967, p. 50); the long-

shoremen and walking boss were ordered by telephone by Leo Goodwin, manager of Stockton Bulk Terminal Co., in the name of Jones (R.T. May 8, 1967, pp. 50, 74); the men provided were a complete "Union set-up" consisting of a walking boss, gang boss and hold men (Deposition of A. W. Gatov, p. 7) and were "supplied" by Jones (R.T. May 8, 1967, p. 6—from testimony of Rudolf Danska); and were all on Jones' payroll (R.T. March 22, 1965, p. 100). The walking boss reported aboard the ship one hour early, and would receive orders from the manager or assistant manager of Stockton Bulk Terminal Co. for "starting the ship. That's all." (Testimony of Leo Goodwin, R.T. May 8, 1967, pp. 77, 78). The gang boss was assigned to report to the walking boss and the longshoremen to report to the gang boss (R.T. March 22, 1965, pp. 97, 98). The chain of command was from the manager or assistant manager of Stockton Bulk Terminal Co. to the walking boss and thence from the walking boss to the gang boss and from him to the longshoremen (R.T. March 22, 1965, pp. 99, 119). Sometimes the gang boss or walking boss received orders direct from the ship's mate (R.T. March 22, 1965, pp. 24, 27). The extent of the supervision by Stockton Bulk Terminal Co. was to inform the walking boss of the "layout of the work", "how much is going into what hatch" (R.T. May 8, 1967, p. 75). The walking boss, gang boss and longshoremen were responsible for the operative details of the work, including rigging the gear (R.T. March 22, 1965, p. 72), and spotting the ship (R.T. March 22, 1965, p. 122 and R.T. May 8, 1967, p. 76).

The payroll was handled on the following basis: the walking boss, gang boss and longshoremen were all on Jones' payroll (R.T. March 22, 1965, p. 100), the payroll is made up by one of the men in the gang, either the walking boss or gang boss (R.T. May 8, 1967, p. 61—testimony of Danska); it is made up in the name of Jones Stevedoring (R.T. March 22, 1965, p. 93); it is then transmitted to Jones, who processes it in its office and reports same to P.M.A. to obtain payment of the men by P.M.A. in accordance with the agreement between the P.M.A. and I.L.W.U. for the account of Jones (R.T. May 8, 1967, pp. 55, 56). This is the way payroll is handled in the stevedoring industry "in every case", "this one and others" (R.T. May 8, 1967, p. 66).

Jones then bills these charges back to Stockton Bulk Terminal Co. with a service charge (R.T. May 8, 1967, p. 56). Stockton Bulk Terminal Co. paid to Jones the entire amount of the payroll, plus all assessments, plus a profit (Deposition of A. W. Gatov, p. 12).

Neither Jones nor Stockton Bulk Terminal Co. contracted with the Ship (Deposition of A. W. Gatov, p. 17). Stockton Bulk Terminal Co. contracted its facilities to the Port of Stockton (Deposition of A. W. Gatov, pp. 16, 19) and contracted, in turn, with Jones to hire the men to operate the equipment (Deposition of A. W. Gatov, pp. 6, 7).

On the occasion of this accident, Libelant Mastro was employed out of the Union hall as a gang boss (R.T. March 22, 1965, p. 22). He was assigned to the

ore dock and reported to the walking boss (R.T. March 22, 1965, pp. 97, 98). Jones employed the walking boss, gang boss and longshoremen. Mastro made out the payroll in the name of Jones and was, in fact, paid through P.M.A. by Jones (R.T. March 22, 1965, pp. 93, 95). He generally got his orders from the walking boss, but since the walking boss was out to lunch at the time of the accident, he got his orders from the ship's mate (R.T. March 22, 1965, pp. 64, 65).

The mate instructed Mastro to load ore aft in the hatch (R.T. March 22, 1965, pp. 36, 37). Mastro was supervising the gang (R.T. March 22, 1965, pp. 64, 65) and made the decision that a snatch block had to be moved in order to pour aft (R.T. March 22, 1965, p. 72). It was while implementing the details of this rigging problem that the accident occurred.

A Workmen's Compensation Lien was asserted in this case by Jones (R.T. March 22, 1965, p. 18). Jones paid the premium for the Workmen's Compensation Policy covering the accident to Mastro (R.T. March 22, 1965, p. 121). Stockton Bulk never paid compensation benefits to Mastro (Deposition of A. W. Gatov, p. 25; introduced in evidence at R.T. May 8, 1967, p. 78). The accident report form 202 directed to the United States Department of Labor was introduced in evidence without objection and shows that Jones reported the accident to its compensation insurance carrier Firemans Fund Insurance Co., and reported Mastro as its employee acting within his course and scope of employment (R.T. May 8, 1967, p. 64). Ordi-

narily, accident reports were made out by the walking boss (on Jones payroll), left in the office of Stockton Bulk and forwarded on to Jones for report to Jones' carrier (R.T. May 8, 1967, p. 70). In this case, however, the walking boss was not on the ship and the gang boss, of course, was injured (R.T. March 22, 1965, pp. 64, 65), so the report was made out by Goodwin and forwarded to Jones (R.T. May 8, 1967, p. 72).

II. SUMMARY OF FACTS

A. No defect of gear owned or supplied by Stockton Bulk contributed to cause of accident.

B. The sole proximate cause of accident was the negligence of Plaintiff.

C. Plaintiff was on Jones' payroll.

D. Plaintiff was subject to orders from walking boss, who was on payroll of Jones.

E. Stockton Bulk's superintendents directed only the ultimate end of the job; all operative details were controlled by the walking boss, who gave orders to the gang boss, who gave orders to the longshoremen. The entire crew from the walking boss to the gang boss to the longshoremen were on Jones' payroll.

F. All rights of employment, including the right to hire and fire arose through the Collective Bargaining Agreement between P.M.A. and the I.L.W.U. Jones was a party to the contract.

Stockton Bulk was not. Only Jones had the right to hire and fire.

G. Jones carried the workmen's compensation insurance covering the men on their payroll and the accident was, in fact, reported to Jones' carrier. Jones has asserted a Compensation Lien in this case.

III. SUMMARY OF ARGUMENT

A. The arguments advanced by Appellant as to the reasons for holding Stockton Bulk for indemnity are not in point here, as there was no defect in any gear owned or supplied by Stockton Bulk.

B. The sole basis of an indemnity in this case arises out of the negligence of Plaintiff Mastro and the imputation of that negligence to his employer.

C. The evidence clearly indicates that Mastro was employed by Jones and was acting in the course and scope of his employment by Jones.

D. The "clearly erroneous" rule applies in this case to determine if the Court erred in determining that Mastro was an employee of Jones.

IV. ARGUMENT

A. THE ARGUMENTS ADVANCED BY APPELLANT AS TO THE REASONS FOR HOLDING STOCKTON BULK FOR INDEMNITY ARE NOT IN POINT HERE, AS THERE WAS NO DEFECT IN ANY GEAR OWNED OR SUPPLIED BY STOCKTON BULK.

There is no dispute that the accident was in no way caused by any defect in gear or equipment supplied by Stockton Bulk, but was solely the result of the negligence of Plaintiff Mastro. The majority of Appellant's argument on "The Basis of Indemnity" assumes that Mastro was an employee of Stockton Bulk at the time of the accident, and concludes that Stockton Bulk is the one to whom the indemnity ought to apply.

Thus he argues that the company chosen to load or discharge is chosen because of its expertise in the field of longshoring. Jones was a stevedore contractor "handling general and bulk cargo trade".

Appellant says the ship owner relies on the contractor's method of operation and his supervision and control of the men. Jones provided the supervision through the walking boss and gang boss and they were responsible for all "operative details of the work, including rigging of gear and spotting of the ship". This is the usual method of stevedore operation and here the walking boss or gang boss would take general orders from either the terminal superintendent or from the ship's mate. Yet it cannot be argued that Mastro was an employee of the ship owner.

Appellant cites cases holding that the contractor is in a better position to prevent accidents as a result of defects in its equipment or human failures on the part of the men doing the work. There was no defect in equipment that caused the accident and only the employer of Mastro could be in a position to exercise control over him to prevent his "human failure". Jones was a member of P.M.A. and was bound by the Collective Bargaining Agreement between P.M.A. and the I.L.W.U. Mastro was a member of the I.L.W.U. and the enforcement procedures which would require that Mastro follow the safety rules and practices contemplated by the agreement would be available only to Jones. Thus, liability should fall "upon the party best situated to adopt preventive measures and thereby reduce the likelihood of injury". *Italia Societa v. Oregon Stevedoring Co.,* 376 U.S. 315 at 324. Jones was that party. Stockton Bulk was not.

Although the ship owner's indemnity is based upon a contractual relationship, it does not follow that the contract must be one between the ship owner and the stevedore (*Crumady v. The Joachim Hendrik Fisser,* 358 U.S. 423). Thus, whereas Stockton Bulk without a contract with the ship owner would be liable to indemnify the ship owner if the equipment supplied for the service of the ship was defective (*Italia Societa v. Oregon Stevedoring,* supra), Jones would be liable to indemnify for the negligence of its men, which subjects the ship owner to a loss (*Arista Cia. De Vapores S.A. v. Howard Terminal,* 372 Fed. 2d 152).

B. THE SOLE BASIS OF AN INDEMNITY IN THIS CASE ARISES OUT OF THE NEGLIGENCE OF PLAINTIFF MASTRO AND THE IMPUTATION OF THAT NEGLIGENCE TO HIS EMPLOYER.

The sole cause of the accident in question was the negligence of the Plaintiff Mastro. In *Arista Cia. De Vapores, S.A. v. Howard Terminal,* supra, such was the finding of the trial court. In holding that the negligence of the injured plaintiff was *imputed* to his employer so as to require the employer to indemnify the ship owner, the court said:

> "The stevedore company's duty under its warranty includes the duty to *provide* longshoremen who will exercise reasonable care for their own safety, as well as for the safety of others, in the performance of their work. Failure of a longshoreman to perform his duties constitutes a breach of the stevedore's warranty rendering the stevedore company liable for all harm to the ship owner resulting from the breach." (Italics ours.)

The longshoremen in this case were "*provided*" by Jones under its contract through P.M.A. with the I.L.W.U. The only remaining question is whether Mastro was employed by Jones and acting in the course and scope of his employment by Jones so that his negligence would be the negligence of Jones and thus the basis of a breach of warranty by Jones.

C. THE EVIDENCE CLEARLY INDICATES THAT MASTRO WAS EMPLOYED BY JONES AND WAS ACTING IN THE COURSE AND SCOPE OF HIS EMPLOYMENT BY JONES.

The evidence is fully reviewed under Statement of the Case. The question is whether that evidence establishes that Mastro was an employee of Jones, acting in the course and scope of his employment, so that his negligence would be imputed to Jones and render Jones liable to the ship owner or whether he was an employee of Stockton Bulk. Here we must look to simple principles of respondeat superior.

Under the rule of respondeat superior the master is held liable for the torts of his servants committed within the course of their employment (California Civil Code Sec. 2338; 32 Cal. Jur. 2d 538).

It must be established (1) that the relation of master and servant existed at the time of the wrongful act; and (2) that the act was done in the course and scope of the servant's employment (*Tarasco v. Moyers,* 81 C.A. 2d 804).

In determining whether the relationship of master and servant exists and with whom it exists, the same principles and tests are applicable. The right of control by the master over the conduct of the servant and the determination of who has the responsibility for the selection and retention of the servant are basically determinative. The right to hire and fire is necessarily a factor in considering the right to control the immediate activities of the servant (32 Cal. Jur. 2d 542). Actual control of the servant is evidence of the right of control (*Lewis v. Constitution Life Co.,* 96 C.A. 2d

191). Not only the right to hire and fire is a factor, but also the obligation to pay wages must be considered (*Peters v. United Studios,* 98 C.A. 373).

Where general and special employment exists, to escape liability the general employer must resign full control of his servant (*Gavel v. Jamison,* 116 C.A. 2d 635). Where the general employer has not relinquished the power to discharge his employee, he is not relieved of liability because the special employer directs the employee where to go and what to accomplish in his work (*Doty v. Lacey,* 114 C.A. 2d 73). Partial control by the special employer, suggestions as to details or cooperation necessary where the work is furnished as part of a larger operation is not sufficient to relieve the general employer of liability (*Doty v. Lacey,* supra). The fact that the employee does not report to the general employer is not controlling (*Peters v. United Studios,* supra).

Applying these rules to the case at hand, Jones had the right to select and retain Mastro, i.e., to hire and fire, and Stockton Bulk did not. Jones had the obligation to and did, in fact, pay Mastro for his services. Control of the operative details of loading the ship, rigging the gear, moving the ship, etc., lay entirely within the discretion of the walking boss and gang boss, both of whom were selected and paid by Jones. Stockton Bulk's superintendent had no right to fire the men supplied by Jones nor could they control the details of the work. They could only inform the walking boss of the layout of the work and the rest was up to the men supplied by Jones. Jones provided the

Workmen's Compensation Insurance covering its employees and this accident was reported to its carrier. Jones asserts a lien herein for benefits provided. Jones was thus protected by the exclusive remedy provision of the Act, 33 U.S.C. Sec. 905, and Stockton Bulk was not.

Looking at all of the evidence as a matter of first impression, it is apparent that the trial court made a correct decision in holding Jones ultimately liable for the negligent conduct of Mastro and thus responsible to indemnify the ship owner.

D. THE "CLEARLY ERRONEOUS" RULE APPLIES IN THIS CASE TO DETERMINE IF THE COURT ERRED IN DETERMINING THAT MASTRO WAS AN EMPLOYEE OF JONES.

Rules of Civil Procedure No. 52 states as follows:

> "Findings of Fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses."

The "clearly erroneous" rule governs the findings of Admiralty Court (*Commercial Transport Corp. v. Martin Oil Service,* 374 Fed. 2d 813).

The case of *Taft Broadcasting Company v. Columbus Dayton Local of the American Federation of Television and Radio Artists,* 297 Fed. 2d 149, is not controlling here. In that case there was a stipulated set of facts. Here there is general agreement, but there are significant contradictions in the testimony

of Danska and Gatov. The trial court heard the testimony and evaluated same.

In *Taft* (supra), the court held that the finding of employment was one of law and drew its own conclusions from the stipulated facts. To reinforce its position, the court further held: "If this finding, however is considered to be a finding of fact, then in our opinion it is clearly erroneous."

The appellate court is in no position to superimpose its determination of the facts upon the trial court that took the evidence in the case. It is often said that the question of employment is a mixed question of law and fact. If the court feels the finding of employment is insufficient, the matter should be remanded to the trial court for preparation of additional supportive findings.

If this court feels that the finding is a proper one, the trial court should be affirmed.

V. CONCLUSION

Stockton Bulk was a terminal company providing gear and equipment for bulk loading of cargo. Jones provided the men, including the bosses, with authority to control details of the work. No gear supplied by Stockton Bulk was defective. Mastro was negligent and his negligence was the sole proximate cause of the accident. Mastro was an employee of Jones and his negligence was imputed to Jones; Jones breached its warranty to the ship and even to Stockton Bulk

and should be required to indemnify. The findings and conclusions in this case are supported by the evidence and are not in error. The trial could should be affirmed.

Dated, San Francisco, California,
December 10, 1968.

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